

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA, : CASE NO. 1:18-cr-0043
:
Plaintiff, :
vs. : STATUS VIDEOCONFERENCE
:
YANJUN XU, also known as XU :
YANJUN, also known as QU HUI, : 30th of September, 2021
also known as ZHANG HUI, : 12:00 P.M.
:
Defendant. :

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE TIMOTHY S. BLACK, JUDGE

APPEARANCES:

For the Plaintiff:

Timothy S. Mangan, Esq.
Emily N. Glatfelter, Esq.
Assistant United States Attorneys
221 East Fourth Street, Suite 400
Cincinnati, Ohio 45202

For the Defendant:

Ralph William Kohnen, Esq.
Jeanne Marie Cors, Esq.
Taft Stettinius and Hollister
425 East Walnut Street, Suite 1800
Cincinnati, Ohio 45202
and
Florian Miedel, Esq.
Miedel & Mysliwiec, LLP
80 Broad Street, Suite 1900
New York, New York 10004

Also present:

May Harding, Interpreter
YanJun Xu, Defendant

Law Clerk:

Cristina V. Frankian, Esq.

Courtroom Deputy:

Rebecca Santoro

Stenographer:

Lisa Conley Yungblut, RDR, RMR, CRR, CRC
United States District Court
100 East Fifth Street
Cincinnati, Ohio 45202

Proceedings recorded in stenotype.

Transcript produced with computer-aided transcription.

1 (Proceedings held by videoconference at 12:00 p.m.)

2 THE COURT: Good afternoon. This is United States
3 District Court Judge Timothy Black on the record appearing
4 by videoconference as if in the open courtroom. We're here
5 on the criminal docket in the case of *United States versus*
6 *Xu*, 1:18-cr-43. We're here for a status conference
7 specifically relating to upcoming jury selection.

8 I'd like to begin by identifying the participants
9 in this conference. Who appear as the attorneys for the
10 United States of America?

11 MR. MANGAN: Good afternoon, Your Honor. Tim
12 Mangan and Emily Glatfelter for the government.

13 THE COURT: Good afternoon to the two of you. I
14 can see you on the videoconference and I heard you, Mr.
15 Mangan.

16 Who appear as the attorneys for Mr. Xu?
17 Mr. Kohnen, are you threatening -- there you go.

18 MR. KOHNEN: Sorry about that. I'm here on behalf
19 of Mr. Xu, so is my colleague, Florian Miedel, who's also on
20 the screen. Jeanne Cors is there with Mr. Xu. And present
21 also is May Harding, our interpreter.

22 THE COURT: Good afternoon to all of you. And I
23 can see Mr. Miedel. I see you, Mr. Kohnen. I see Ms. Cors
24 in the presence of Mr. Xu.

25 And, Mr. Xu, good afternoon. I'm Judge Black. Can

1 you hear me?

2 THE DEFENDANT: Yes.

3 THE COURT: Very well. Good afternoon.

4 And we have an interpreter present. Ma'am, if
5 you'd be willing to take an oath to accurately translate the
6 language. Your right hand is up, mine is as well.

7 Do you solemnly swear or affirm that you will
8 accurately translate these proceedings under the penalties
9 of perjury?

10 THE INTERPRETER: Yes, I will.

11 THE COURT: Thank you. You may lower your right
12 hand. And on behalf of the Court and the community, thank
13 you for the work you are doing.

14 Also engaged in this conference is Cristina
15 Frankian, who's my career law clerk, she's a lawyer, works
16 for me; also Rebecca Santoro, who's the courtroom deputy and
17 my assistant. The US Marshal, John, is linked to the
18 conference as well. The court reporter is Lisa Conley
19 Yungblut, whom the Court is grateful for her presence and
20 continuing work.

21 Let me make a short statement and then we'll hear
22 from each side in turn. We're scheduled to go to jury trial
23 beginning October 18th running potentially up until
24 December 1st with time off for Thanksgiving. Due to the
25 length of the anticipated trial as well as the issues

1 presented in this case, which pose a particular risk of
2 bias, particularly under the current circumstances, the
3 Court anticipates having a difficult time finding jurors who
4 are ready, willing, and able to serve. To ensure a larger
5 pool, the Court called 350 prospective jurors, and of those,
6 175 prospective jurors responded.

7 Let me pause and ask the interpreter whether you
8 are able to keep up with me and whether Mr. Xu can tell me
9 that he understands what I'm saying?

10 THE DEFENDANT: Yes.

11 THE COURT: Very well. And the interpreter, ma'am,
12 you're able to keep up with me; is that right?

13 THE INTERPRETER: Yes.

14 THE COURT: Thank you for your work.

15 All right. So we called for 350 prospective
16 jurors. We've gotten 175 that have responded.
17 Additionally, there are currently three jury trials,
18 including our own, scheduled to begin in Cincinnati on
19 October 18, 2021. Therefore, those 175 jurors need to be
20 divided between the three trials. Typically, the jury
21 coordinator would wait until the morning of voir dire, first
22 day of trial, and after every prospective juror arrives
23 would simply assign the jurors to a trial evenly. For
24 instance, the first 50 would go to our trial, the next 50
25 would go to Judge Dlott's trial, the next 50 would go to

1 Judge McFarland's trial.

2 But, again, our trial has a higher likelihood of
3 needing to excuse jurors for hardships or cause, based
4 largely upon length and the subject matter. Therefore, if
5 we do not work to identify viable jurors for our trial in
6 advance, we could ultimately be assigned 50 prospective
7 jurors most of whom will get excused due to hardships,
8 availability, bias, thereby, leaving us with too few jurors
9 to proceed. We would then have to call a new pool and start
10 jury selection over; whereas, there may have been jurors
11 present that day who could have served on our jury if they
12 had only been in our group.

13 In an effort to pre-identify viable jurors, the
14 Court sent out a supplemental questionnaire which both sides
15 reviewed and approved. Now the Court must create a
16 procedure that will hopefully alleviate the concerns I've
17 just raised. Excuse me. And our proposal is for the Court,
18 the judge, to review the questionnaires first and to, quote,
19 pre-exclude, end quote, the jurors who would have inevitably
20 been excused had they appeared in our courtroom for voir
21 dire the morning of trial. Those jurors that we would
22 pre-exclude would then go to one of the other two trials,
23 thereby, leaving us with a pool of jurors who we know are
24 ready, willing, and able to serve the entirety of the trial
25 free of bias or prejudice.

1 But before we proceed in that way, I want to be
2 certain that both sides are comfortable with the proposal.
3 If both parties unanimously agree that the Court can
4 pre-exclude those individuals with hardships, then, we'll
5 proceed accordingly.

6 What I want to avoid is a situation where all agree
7 to this process and then down the road to have either
8 side -- excuse me -- argue that the Court pre-excluded a
9 prospective juror that they would have wanted had they only
10 known about him or her. I don't think it's fair to allow
11 the parties to hand-pick their jury pool in advance, which
12 is why my proposal is to allow me to exercise my discretion
13 as reflected in law in a fair and neutral manner just as I
14 would have done if the jurors had appeared in person for
15 voir dire.

16 What we're trying to avoid is getting assigned 50
17 prospective jurors of -- a large number of which we already
18 know are unavailable or ought to be excused perhaps, for
19 example, in bias. The individuals who would be unavailable
20 for our weeks-long trial could well be available for the
21 other two trials, and they should be diverted there before
22 the morning of voir dire.

23 The proposed categories of exclusion that I would
24 exercise with your consent is, No. 1, unavailability. If
25 they have got a prescheduled vacation, a doctor's procedure,

1 whatever, if they are indicating they're not available for
2 the entirety of our trial, we have to excuse them now and
3 not have unavailable people in our pool. Unavailability is
4 related to work and financial hardship. It's related to
5 medical concerns.

6 And then the absolute proposed category of
7 exclusion would include non-mask-wearers who indicate
8 they're unwilling to wear a mask given the pandemic, which
9 would be in violation of the Court rules and would be a
10 basis to exclude them.

11 I'd like to talk subsequently about how we deal
12 with bias. If we have an indication that a juror says they
13 can't trust anybody from -- who doesn't share their
14 Judeo-Christian values or who comes from China, I think we
15 ought to address that beforehand, but you may want to
16 address it during voir dire. What we're trying to do is
17 build a pool that gets assigned to us which is people who
18 can serve unless excused by the parties pursuant to
19 preemptory challenges or for cause.

20 So having said all of that, I want to go around the
21 table and understand what your reaction is, if you have
22 questions or comments, and I'll do it one side at a time.
23 And my career law clerk, Ms. Frankian, may well be called
24 upon to respond to any of your comments along with me.

25 So with that, which of the attorneys for the United

1 States can be responsive to what the Court is presenting
2 now?

3 MR. MANGAN: Your Honor, this is Tim Mangan. I'll
4 speak on behalf of the government.

5 THE COURT: Very well.

6 MR. MANGAN: Your Honor, we certainly understand
7 the difficulty that we've got here based on all of the
8 factors that you've just laid out and the situation
9 upcoming. With respect to what the Court has laid out, we
10 would be agreeable. We have no problem with the
11 unavailability issue that the Court walked through, that the
12 Court would then look at the questionnaires, as I understand
13 it, and sort of in the normal course look at those who
14 simply cannot serve for that long a time for all of the
15 various reasons that you identified. And we understand the
16 reason why you want to try to do that without us being the
17 parties preselecting the jury pool.

18 The second category that you mentioned were those
19 who would be refusing to wear masks in accordance with Judge
20 Marbley's order. Given that what they're indicating would
21 violate the Southern District of Ohio order, we certainly
22 understand why and think the Court would have discretion to
23 handle those jurors separately.

24 Our proposal would be at that point to kind of see
25 where we are as far as the numbers, because when it gets to

1 sort of that next step of cause and talking about
2 individuals with bias, I know traditionally in normal
3 selection, that's one where at least the parties would be
4 able to see the questionnaires at that time and sometimes
5 ask questions. I realize that some questions -- some
6 answers on the questionnaire may seem very, very clear, but
7 we've all seen with some jury selections where there's a
8 back-and-forth about certain individuals.

9 So I guess our proposal, Your Honor, in response to
10 what you laid out is we would be agreeable to the process
11 certainly as to those first two categories, the
12 unavailability and the refusal to follow the mask order for
13 the district. We would suggest at that point seeing where
14 we are as far as numbers for the pool, and if there's still
15 a problem and you think we need to go to that next step, you
16 know, in terms of screening bias or -- can we wait and do
17 that during the normal voir dire?

18 Or is there a way to -- another option would be at
19 that point maybe the parties could see the questionnaires
20 that are at issue and we could at least discuss those
21 potential bias issues, you know, in an adversarial -- or,
22 you know, in the normal court hearing like this, but with us
23 having the benefit of at least knowing what we're talking
24 about from the questionnaire. So that's our initial
25 feedback, Your Honor.

1 THE COURT: And that's entirely responsive and
2 professional, and the Court expresses its appreciation for
3 that approach.

4 Ms. Glatfelter, has Mr. Mangan spoken
5 comprehensively or would you like to supplement?

6 MS. GLATFELTER: No, I agree with everything said.
7 Thank you.

8 THE COURT: Very well. Who'll be heard on behalf
9 of the defendant?

10 MR. KOHNEN: Your Honor, this is Ralph Kohnen.
11 I'll be happy to speak on behalf of Mr. Xu. But I would
12 also ask the Court since my colleague, Jeanne Cors, is there
13 in the jail with him and the translator, that she be given
14 an opportunity, No. 1, to make sure that he understands
15 what's been said so far; and, secondly, that after I speak
16 what will of course be my opinion, he concurs and it then
17 becomes our opinion, with the Court's permission.

18 THE COURT: That's absolutely appropriate and
19 granted. Let me at this stage ask Ms. Cors and Mr. Xu and
20 the translator whether you've heard everything I said and
21 you've also heard everything the government has said?

22 THE DEFENDANT: Yes.

23 THE INTERPRETER: Yes.

24 THE COURT: That right, Ms. Cors?

25 MS. CORS: Yes, Your Honor.

1 THE COURT: Very well. So, Mr. Kohnen, I would
2 propose that you give us the Defendant Xu's reaction at this
3 stage, and we'll confirm it with Ms. Cors and your client.

4 MR. KOHNEN: Okay. Thank you, Judge. For
5 background, Ms. Frankian gave us a heads-up on this, as I'm
6 sure she did with other counsel, so we've had an opportunity
7 to discuss it among the attorneys. And I think that the
8 Court's suggestion along with, I guess I'll call it, Mr.
9 Mangan's next step is a good one. It's one that we came up
10 with as well. You know, I think it's worth everybody
11 reminding themselves that this is a process that is pretty
12 much undertaken by the Courts before trials independent of
13 counsel's involvement, especially with things such as
14 unavailability and what I guess would be fairly unique
15 circumstances.

16 Because of that and for a lot of other reasons, we
17 have no problem with the Court making that -- let's call it
18 the first cut of Category 1, the unavailability,
19 non-mask-wearers, and would probably expand a little bit and
20 say that there are probably other more obvious reasons that
21 we absolutely trust the Court to excuse potential jurors
22 for.

23 Jeanne, you want to make sure Xu's okay with that
24 so far?

25 MS. CORS: Yes. I've spoken with Mr. Xu and he is

1 amenable to that as well.

2 THE COURT: Is that right, Mr. Xu?

3 THE DEFENDANT: Yes.

4 THE COURT: Thank you.

5 MR. KOHNEN: Judge, we also, as I mentioned, like
6 the idea about how that the folks that could be revealed as
7 biased could at least be screened, I guess is a good way to
8 put it. In addition to the questionnaires, I think we would
9 ask that the Court take it upon itself to share with us any
10 other information that might come in about these individual
11 prospective jurors. Again, speaking from experience, that
12 they call the clerk's office sometimes, they get through to
13 chambers on occasion, any communication like that in
14 addition to the juror questionnaires would be appreciated.
15 I think the Court is envisioning, and I think I heard Mr.
16 Mangan say, that we would sort of reconstitute once that
17 second -- I'll call it the second cut is done and discuss
18 where we go from here.

19 For the record and also as a product of our
20 conversation among the attorneys, we, of course, recognize
21 that no matter how we do it, it's ultimately up to the man
22 in the black robe. So we appreciate the accommodations
23 here.

24 THE COURT: Thank you. That's entirely responsive.
25 I think what I heard was that the parties are willing to

1 acquiesce to what the Court has the authority and discretion
2 to do, and that is to excuse people for unavailability and
3 for unwillingness to abide by a court order to wear a mask.
4 After we've done that, we would then regroup, find out where
5 we are in terms of numbers, and then collectively begin to
6 determine how to proceed to evaluate bias, either pre voir
7 dire or at voir dire. Is that what you were saying,
8 Mr. Kohnen?

9 MR. KOHNEN: Yes, Your Honor.

10 THE COURT: And is that the government's
11 perspective, Mr. Mangan?

12 MR. MANGAN: Yes, Your Honor.

13 THE COURT: Ms. Cors, is there anything from your
14 end that we need to touch base with yet? We're not done,
15 but I saw you standing.

16 MS. CORS: No, Your Honor. I'm just making sure we
17 mute and unmute so you can't hear the interpreter.

18 THE COURT: After that experience, will you work
19 with Mr. Kohnen, please? Very well.

20 Ms. Frankian, I'm on the record. You have been
21 extraordinary in driving this attempt to be efficient,
22 totally transparent, fair and impartial. Is there anything
23 that the government has said you want to respond to or
24 clarify? Is there anything the defense has said that you
25 would like to inquire of, respond to, or clarify?

1 MS. FRANKIAN: No, Judge. So we would pre-excuse
2 the unavailable prospective jurors and those with financial
3 hardships, physical concerns, non-mask-wearers. And then
4 should -- should I separate out those individuals who
5 have -- who the Court is inclined to excuse for bias so that
6 everyone can weigh in on those individuals separately or
7 should I just send everyone remaining?

8 THE COURT: My understanding is you were going to
9 identify the potential biased prospective jurors, and we
10 would talk through those questionnaires and those alone with
11 the lawyers, and then we would confer as to whether there's
12 a consensus that allegedly biased Juror Nos. 7 and 12 should
13 be pre-excused.

14 Is that your understanding of the approach we are
15 developing, Mr. Mangan?

16 MR. MANGAN: Yes, that would be fine with us, Your
17 Honor.

18 THE COURT: And is that acceptable to the defense,
19 Mr. Kohnen?

20 MR. KOHNEN: Yes, it is, Your Honor. Of course, we
21 would be grateful to get the questionnaires of the venire
22 panel as soon as possible, but we're fine with the way it
23 was stated.

24 THE COURT: Fair enough.

25 Is that responsive to your inquiry, Ms. Frankian,

1 or do you have additional follow-up?

2 MS. FRANKIAN: I think that's responsive.

3 THE COURT: Very well, I agree. And all of the
4 lawyers, even the judge, appreciate the enormous work
5 Ms. Frankian does for the Court day after day after day. So
6 that is the way in which we will proceed.

7 I need to ask directly on the record if the Court
8 proceeds in the way that we just amicably came to an agreed
9 approach, no complaint, no appeal of that portion of the
10 voir dire selection process; is that right from the
11 government's perspective, Mr. Mangan?

12 MR. MANGAN: It is, Your Honor, yes.

13 THE COURT: Is that right, Mr. Kohnen, from the
14 defendant's perspective?

15 You're muted. You're muted. Mr. Kohnen, you're
16 muted.

17 MR. KOHNEN: Sorry, Judge. My software does it
18 automatically.

19 I'll promise you that none of the lawyers who are
20 involved in this case before the trial court will appeal.

21 THE COURT: On this issue.

22 MR. KOHNEN: Of course, on this issue. And I would
23 like Ms. Cors to make sure that our client understands that.

24 THE COURT: Very well. Ms. Cors, can you confer
25 with Mr. Xu -- you don't have to speak in my presence -- and

1 then advise me?

2 MS. CORS: Yes, Your Honor.

3 THE COURT: So have you asked Mr. Xu, if we proceed
4 in this way, he understands there's no complaining about it
5 or appealing about it later?

6 THE DEFENDANT: Yes.

7 MS. CORS: Yes, we have conferred with him, and he
8 is amenable to that.

9 THE COURT: I also heard him say "yes."

10 So I think we have accomplished in large part what
11 we had intended today. It's always nice to see you, Mr.
12 Miedel.

13 MR. MIEDEL: Thank you. You too.

14 THE COURT: Very well. Is there more we need to
15 discuss today from the government's perspective? We'll be
16 chatting regularly going forward.

17 MR. MANGAN: No, Your Honor. Thank you very much.

18 THE COURT: Anything further from the defendant's
19 perspective, Mr. Kohnen?

20 MR. KOHNEN: No, Your Honor. I hope you can hear
21 me. Thank you to the Court and to Ms. Frankian.

22 THE COURT: Thank you, Mr. Kohnen. That's a credit
23 to you.

24 Anything further from your end, Ms. Cors, from Mr.
25 Xu's perspective today at this time?

1 MS. CORS: No, Your Honor, other than to thank the
2 Court for organizing the conference here. Chambers was very
3 helpful in facilitating the logistics.

4 THE COURT: Very well. Glad to hear that. It
5 doesn't surprise me.

6 Ms. Frankian, is there more we should proceed today
7 or are we prepared to adjourn this?

8 MS. FRANKIAN: Nothing further, Judge.

9 THE COURT: Very well. I want to thank you all for
10 participating timely. I want you to know that I want you to
11 stay safe and do well. Thank you for calling in timely.
12 I'm going to end the hearing now by saying goodbye and
13 leaving the meeting. Thank you all.

14 (Proceedings concluded at 12:26 p.m.)

15 **C E R T I F I C A T E**

16 I certify that the foregoing is a correct transcript of
17 the record of proceedings in the above-entitled matter
prepared from my stenotype notes.

18 /s/ Lisa Conley Yungblut 10/12/2021
19 LISA CONLEY YUNGBLUT, RDR, RMR, CRR, CRC DATE

20

21

22

23

24

25